

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-cv-329-GKF(PJC)
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF ITS MOTION IN  
LIMINE TO PRECLUDE EXPERT TESTIMONY OF DEFENDANTS' WITNESS  
MICHAEL J. MCGUIRE

Plaintiff, the State of Oklahoma ("the State") has moved, pursuant to Fed. R. Evid. 104 and 702, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for an order in limine precluding the expert testimony of Defendants' witness Michael J. McGuire regarding the impacts of the land application of poultry waste on water quality in the IRW and human health risks. In their response to the State's Motion (Dkt. # 2167) ("Response"), Defendants attempt to rehabilitate Dr. McGuire's opinions and argue that he is qualified to testify outside his area of expertise. Defendants' arguments are without merit and fail to establish that Dr. McGuire's opinions satisfy the requirements of *Daubert*.

**I. Defendants' Response fails to establish that Dr. McGuire's "Opinion #1" satisfies the requirements of *Daubert*.**

Defendants respond to the State's argument that Dr. McGuire's "Opinion #1" does not meet the requirements of *Daubert* by (1) making numerous brief (and unsupported) arguments that the statistical comparison of ICR and IRW data discussed in Dr. McGuire's report is reliable, (2) misstating the obvious meaning of the *Bukeveckas* article cited by Dr. McGuire, and (3) claiming that Dr. McGuire has experience that he himself denied having in his deposition. Defendants' arguments fail for the following reasons.

**A. Defendants fail to establish the reliability of the statistical comparison of IRW and ICR data**

Defendants' Response attempts to defend the purported appropriateness of the statistical comparison of ICR and IRW data<sup>1</sup> upon which Dr. McGuire bases his "Opinion #1" with a wide ranging variety of arguments. Defendants' arguments miss the mark and make broad generalizations that fail to establish that Dr. McGuire's "Opinion #1" is reliable.

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<sup>1</sup> Dr. McGuire's "Opinion #1" is based upon a comparison of Information Collection Rule (ICR) data, which is a large nation-wide collection of total organic compound (TOC) data, against a smaller set of TOC data from the IRW. The comparison of the data was performed by Clifton Bell, a non-testifying individual who works at a private consulting firm.

First, Defendants argue that Dr. McGuire has previously performed statistical comparisons similar to the comparison of ICR and IRW data discussed in his report numerous times in the past, and thus the methodology meets the requirements of *Daubert*. Defendants' arguments cannot overcome the straightforward admission Dr. McGuire gave under oath at his deposition regarding the statistical comparison of ICR and IRW data, making Defendants' attempts to explain away Dr. McGuire's testimony ring hollow. Specifically, Dr. McGuire made clear during his deposition that he is "not an expert" in the field of statistics and that he had done "nothing quite like this" statistical comparison in his report. Dkt. 2060, Ex. 2, pp. 231, 238. Defendants attempt to rehabilitate Dr. McGuire in their Response by attaching an affidavit by Dr. McGuire which includes the CV of the individual who actually performed the statistical comparison, Clifton Bell, and by claiming that Dr. McGuire "supervised and directed" Mr. Bell. See Dkt. 2167, Ex. C. Dr. McGuire's affidavit states that he has performed other types of (unspecified) statistical analyses in the past, that he personally believes Mr. Bell is qualified, and that in his opinion "comparing long-term TOC datasets for different water supplies collected up to ten years apart is appropriate." See Dkt. 2167, Ex. C. Whether Mr. Bell is qualified to perform some statistical comparisons is not the issue presented in the State's motion. The problem with Dr. McGuire's opinions is that he reaches beyond his *own* expertise, adopting the work of a non-testifying individual who performed a statistical work unlike any Dr. McGuire had ever done before, and one which is not established as a reliable method for reaching the conclusions Dr. McGuire opines upon in his report. See *TK-7 Corp. v. Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993) (excluding opinions of proffered expert who adopted work of another individual that was outside his own expertise). Dr. McGuire's affidavit does not respond to this problem, and instead simply provides his extraneous personal opinions about Mr. Bell's

qualifications and whether the methods Mr. Bell employed were “appropriate.” *See id.* (“The rule [703] implicitly requires that the information be viewed as reliable by some independent, objective standard beyond the opinion of the individual witness) (*citing* 3 J. Weinstein & M. Burger, Weinstein’s Evidence P 703[03] at 703-25 (1988)). Defendants’ arguments that Dr. McGuire supervised Mr. Bell also fail as Dr. McGuire testified that he deferred to Mr. Bell’s expertise for determining the best statistical methods to use. *See* Dkt. 2060, Ex. 2, pp. 229-231.

Second, Defendants argue that Dr. McGuire has previously published peer-reviewed articles in which he relied on other people to perform some type of (unspecified) statistical analyses, thus his reliance on Mr. Bell in this case is not unusual. Response, p. 5-6. The materials cited in Defendants’ Response cover a breadth of different topics, but Defendants fail to specifically identify an instance where Dr. McGuire performed or employed a statistical comparison like the one he relies upon for his opinions in this case. In fact, the articles cited contain very little statistical analysis at all, none of them involve the type of work Mr. Bell performed here, and none of the studies employed the Mann-Whitney statistical comparison method used by Mr. Bell.<sup>2</sup> *See* Ex. 1 (seven articles and book chapters cited by Defendants). As Dr. McGuire testified, he had never performed an analysis like the one he sets forth in his report; indeed, he required another individual to figure out how to do it, because as he explained in his own words, he is “not an expert” in this area. *See* Dkt. 2060, Ex. 2, pp. 229-231.

Third, Defendants argue that Dr. McGuire rendered opinions in other cases based upon “another’s statistical work,” and therefore his opinions based on the work of Mr. Bell are admissible here. *See* Response, p. 6. Defendants cite to two cases filed in the Southern District

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<sup>2</sup> Defendants also separately cite the book for which Dr. McGuire was a “senior editor,” but fail to provide specific cites in this book that support their position. *See* Response, p. 5. Of the seven cites listed in their Response in footnote 5, two of those are chapters from that book and they do not involve statistical analysis. *See* Ex. 1.

of New York for the proposition that Dr. McGuire has previously “testified” about the work of another statistician, Jeffrey Rose. *See* Response, p. 6. However, it appears from Dr. McGuire’s CV and the dockets in those cases that the only testimony Dr. McGuire provided in those cases has been his *deposition* testimony. *See* Dkt. 2167-5, p. A-44. It appears that there has been no determination of whether Dr. McGuire’s testimony in those matters is admissible under *Daubert*, thus this argument is of no consequence in this Court’s *Daubert* analysis.

Fourth, to support their argument that Dr. McGuire’s opinion in this case is reliable, Defendants cite heavily to publications by various authors “utilizing ICR data.” *See, e.g.,* Response, pp. 7-8. However, the State is not arguing that the ICR data *itself* is unreliable; rather it is arguing that the method and manner in which Mr. Bell manipulated the ICR data against IRW data in this case, and Dr. McGuire’s opinions based on that manipulation of the data, do not meet the requirements of *Daubert*. The fact that other authors may have used the ICR data in other contexts for other research purposes simply does not provide sufficient specific support for the methodology employed by Mr. Bell and opined upon by Dr. McGuire in this case.

Finally, Defendants also argue that the fact that the ICR data and the IRW data sets compared vary in terms of time, size (and various other factors including quality control processes), is overcome by the fact that Dr. McGuire testified that Mr. Bell used a Mann-Whitney U test to perform the statistical comparison the data. *See* Response, pp. 9-10. In support of this argument, Defendants make the broad generalization that “federal courts have found (1) it is acceptable to compare unpaired datasets, and (2) the Mann-Whitney U Test is a reliable statistical method to analyze such unpaired datasets.” *See* Response, p. 9. Defendants “generally” cite to three cases in a footnote to support this incredibly broad proposition regarding

the admissibility of statistical analysis.<sup>3</sup> See Response, p. 9. These cases do not support their assertion.<sup>4</sup> If anything, these cases demonstrate that the Mann-Whitney U Test is simply a statistical tool, and what determines whether the results of the application of that tool are admissible are the manner in which it is applied, the types of data to which the tool is applied, and the expertise of the person opining about the tool.<sup>5</sup> Those are the factors at issue here -- the person who is opining about the result of the statistical comparison did not perform the statistical comparison and testified that he did not know how to do so and had never done so before, but he

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<sup>3</sup> Defendants also argue that based on this generalization of acceptability of the Mann-Whitney U Test, and the fact that “Dr. McGuire confirmed the validity of the Mann Whitney U Test during his deposition testimony” that the test “satisfies the *Daubert* requirement of having been both tested and accepted by federal courts.” See Response, pp. 9-10. This argument does not make sense. The fact that Dr. McGuire stated that the Mann-Whitney U Test is a valid test establishes nothing in terms of whether that test was applied properly here and whether he has the expertise to testify based on that analysis.

<sup>4</sup> Defendants cite *Baker v. Sec. of the Dept. of Heath and Human Services*, 2003 U.S. Claims Lexis 290 (U.S. Claims Sept. 26, 2003). In *Baker*, the Court summarized voluminous evidence regarding whether childhood vaccines could be deemed a cause of childhood diabetes. In reciting the opinions offered by one scientist against another, the Court explained that one scientist criticized another for using a Wilcoxon method rather than the Mann-Whitney method in his statistical analysis. *Id.* at \* 22. Other than describing the testimony on this topic, the court did not make specific rulings pertaining to the Mann-Whitney method.

*Bridgeport Guardians Inc. v. City of Bridgeport*, 933 F. 2d 1140 (2d Cir. 1991) was a racial discrimination case in which Mann-Whitney analysis was applied to the test results of black, hispanic, and white job candidates to determine whether those results could be attributed to chance.

*Ranbaxy Laboratories Ltd. v. Abbott Laboratories*, 2005 LEXIS 27753 (N.D. Ill. Nov. 10, 2005) involved a drug patent infringement claim and the Mann Whitney test was one of multiple statistical tests employed by experts in biostatistics. Based on the results of *multiple* different statistical tests, the Court determined that preliminary infringement was established on a particular claim.

<sup>5</sup> Moreover, some federal courts have specified that the Mann-Whitney test is appropriate for small sets of data, which conflicts with how it was used here, especially in regard to the voluminous ICR data. See e.g. *Fritz v. Baker*, 1990 U.S. Dist. LEXIS 397 (S.D.N.Y. Jan. 17, 1990) (“Dr. Tanaka’s statistical findings were predicated on a small sample using a rank sum test, known as the Wilcoxon Test or *Mann-Whitney Test, which is appropriate for small samples*) (emphasis added); *Osahar v. Carlin*, 642 F. Supp 448 (S.D. Fl. 1986) (“The Mann-Whitney U-Test is a generally recognized statistical tool for determining whether differences in outcomes involving *small sample populations* are statistically significant. See Siegel, *Nonparametric Statistics* (McGraw-Hill 1956) at 116-120)”) (emphasis added).

nevertheless uses that statistical comparison as the basis for his wide-reaching opinions. The person who performed the statistical comparison (Mr. Bell) is not testifying in the case and Dr. McGuire admitted that the statistical comparison performed was beyond his expertise.

**B. Authority cited by Dr. McGuire blatantly contradicts his conclusions**

Dr. McGuire cited one publication in his report for the proposition that poultry waste applied to fields in the IRW has no discernable impact on TOC or the production of THMs and HAAs -- "Internal and External Sources of THM Precursors in a Midwestern Reservoir" by Bukaveckas et al. Then, he was actually *surprised* to read the conclusions set forth in the Bukeveckas et al. article during his deposition and even asked "[h]ow in the world did this get published," which he followed by calling one of the conclusions "absurd." *See* Dkt. #2060, Ex. 2, pp. 476-478. Apparently, before citing to this article in his report, Dr. McGuire never bothered to read the conclusions reached by the authors. Defendants now argue that somehow, despite the conclusion of Bukeveckas et al. that "implementation of best management practices to mitigate nutrient loading likely would diminish THM formation potential by reducing algal abundance in tributaries and other source waters" (Dkt. # 2060, Ex. 3) that Bukeveckas et al. supports Dr. McGuire's opinions that a link cannot be found between activities in a watershed and DBP formation. This argument simply defies logic. The Bukeveckas et al. article clearly reaches the opposite conclusion of Dr. McGuire. It found that activities in a watershed, i.e. best management practices to mitigate nutrient loading likely would diminish THM formation potential by reducing algae.

Defendants make the additional argument that there is some greater body of literature that Dr. McGuire reviewed, which provides more support for his opinions. *See* Response, p. 11, fn 8. This effort to introduce additional reliance material is untimely and therefore irrelevant.

Pursuant to Rule 26, Defendants were required to disclose Dr. McGuire's opinions and the bases for those opinions in January of 2009. To the extent there may be other literature that Dr. McGuire contends might support his opinions, which he failed to cite or reference in his report, Defendants cannot rely upon that material now to rehabilitate Dr. McGuire only after they realized the conflicts presented by Bukeveckas et al. in the *Daubert* stage of the case. Dr. McGuire's opinions are limited to what he set forth in his report, and Defendants' bare assertion that other literature purportedly exists and was reviewed is insufficient to rehabilitate Dr. McGuire's "Opinion #1."

**C. Dr. McGuire testified that he has only evaluated the source of contamination of water bodies on two previous occasions and those are completely different from the circumstances in this case.**

In response to the State's position that Dr. McGuire is not qualified to address the issue of whether land applied poultry litter is impacting the water quality of water bodies in the IRW, Defendants argue that he is qualified to address this topic because he has "240 publications and presentations regarding drinking water and treatment of drinking water" and because he has worked on various other drinking water projects. *See* Response, p. 12 - 13. The State is not challenging Dr. McGuire's expertise as a *drinking water* expert, but is challenging his expertise and ability to opine *beyond* the issues of drinking water treatment and quality to the broader issue of the causes of water pollution in the IRW, which he attempts to do in his "Opinion #1."<sup>6</sup>

It became evident during Dr. McGuire's deposition that identifying the sources of contamination in water bodies is a topic that he has barely touched on during his career in water treatment. Dr. McGuire testified that there were only *two* projects he worked on where he was a

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<sup>6</sup> "Opinion #1" asserts that "[i]t is my opinion, based on a reasonable degree of scientific certainty, that application of poultry litter to fields in the IRW has no discernable impact on the levels of total organic carbon in IRW waters." *See* Dkt. 2060, Ex. 1, p. 1.



member of a team that found sources of contaminants in water, and both of those instances are markedly different than the identification of the sources of pollutants in this case. Ex. 2, McGuire Dep. pp. 135-136. The two projects identified by Dr. McGuire in his deposition are completely different than his work in this case and do not qualify him to proffer opinions regarding sources of water contamination in the IRW. In the project involving asbestos, Dr. McGuire described the “source tracking” in that project as follows:

Q: Okay. What project did you undertake to keep asbestos from getting into a reservoir?

A: That was the survey of the State Water Project that was done in the early 1980’s where we discovered that the State of California was taking in these flood flows from the Coalinga area, and so we encouraged them to find alternate ways of getting rid of the stormwater than putting it into the aqueduct because of the problem with the fact that the runoff was coming from these asbestos mines.

Q: Okay, did you do any of the source identification work to identify the location of the asbestos released?

MR. JORGENSEN: Objection, asked and answered.

A: We did the sampling of the water. The source was obvious. It was there. I mean, you could see it physically. The level of asbestos fibers in the stormwater were huge, and, also they laid down a sediment layer in the aqueduct itself of – of high concentrations of asbestos fibers in the sediment that then would be slowly released over time. So it was kind of a mess all the way around, and getting them to change their operations so that that didn’t happen anymore was our goal.

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Q: Okay, were you able to identify the mine as source of the asbestos?

A: We – yes. It was pretty obvious where it was coming from. These were massive concentrations, and there was a specific activity that was easily identifiable. There was no mystery here. You know, it was mines, stormwater. There were gates that let the water into the – the aqueduct, and the concentrations below were much higher than they were above. It was quite obvious what was going on.

Ex. 2, pp. 126-128. Clearly, there was no real “source tracking” work performed by Dr.

McGuire in the Coalinga asbestos project, and his work was focused on removing an already identified problem in a water supply, not on identifying the source of the contamination.

Dr. McGuire’s involvement in the “San Joaquin Delta” project likewise fails to qualify him to offer opinions about causes of contamination to the IRW. Dr. McGuire was a member of

a team that was evaluating “a small number of wastewater discharges into those reservoirs” and that was “interested in the nutrient cycling through the sediments in all of the reservoirs.” Ex. 2, p. 36. Dr. McGuire described that project as follows:

Q: Okay. Thank you. Did you undertake any – did you or Metropolitan while you were there undertake any studies or surveys to identify any sources of the nitrogen and phosphorus in the four State Water Project reservoirs?

A: There were small wastewater plants that were discharging into the reservoir, and we – we did do some work on those. I’m – the details are very vague in my mind. We were always interested in what was coming into the reservoirs from the main flow of the – of the aqueducts that were bringing water from northern California. They go through a very rich agricultural area in the Sacramento-San Joaquin Delta, and from there they pick up a variety of different materials, and we were always interested in tracking that. So that is – those were the primary sources that we were interested in. These watersheds were pretty – pretty much undeveloped, and so there wasn’t much contribution from – besides these small wastewater plants, much – much contribution from other activities that I can recall.

Ex. 2, pp. 48-49. Dr. McGuire could not remember the details of this project, but from what he could remember, the focus of this project was addressing discharge from small wastewater plants and tracking materials the aqueducts picked up from the San Joaquin Delta, and he did not perform analysis to determine the source of pollutants. *See* Ex. 2, pp. 137. This limited experience, in a completely different context than his opinions in this case, simply does not qualify him to opine on the sources of contamination in the IRW. Defendants’ assertions that Dr. McGuire has been involved in four other projects that involved “sources impacting water quality” conflict with his sworn testimony, and Defendants offer nothing beyond their generalized descriptions of these projects to support their argument. *See* Response, p. 13. Thus, Dr. McGuire’s opinions must be limited to the areas in which he is qualified, and his opinions regarding overall sources of contamination to the IRW should be excluded.

**II. Dr. McGuire reaches beyond his expertise when he testifies about human health risks.**

The State's motion seeks to exclude Dr. McGuire's opinions regarding human health risks because they are beyond his area of expertise as a drinking water engineer. In response, Defendants argue that Dr. McGuire is qualified to testify regarding "safety of drinking water supplies." *See* Response, pp. 14-15. This argument fails to adequately answer the substance of the State's argument -- that Dr. McGuire, who has no training in toxicology or epidemiology, is unqualified to testify about whether risks to human health exist that are attributable to contamination of water in the IRW.

Both sides agree that Dr. McGuire is not a toxicologist. He has no medical training, no training in toxicology or the human health impacts of contaminants. *See e.g.* Ex. 2, pp. 329. Further, Dr. McGuire testified that he is not qualified to give opinions on risks to human health from disinfection byproducts and he has not conducted any scientific or medical research on the health effects of disinfection byproducts. *See* Ex. 2, pp. 482.

Simply put, expertise in treating drinking water supplies, and the standards that regulate drinking water is not the same thing as assessing whether there are risks of human health problems due to exposure to certain substances. The State does not dispute that Dr. McGuire may be qualified about whether certain levels of certain substances meet or do not meet standards set by regulatory authorities. The problem is that Dr. McGuire's proffered opinions reach beyond whether standards are met, and they stretch into whether any human health risks exist. Furthermore, Dr. McGuire directly attacks the opinions of the State's expert toxicologist regarding human health risks -- something that Dr. McGuire, despite his long career in water treatment, simply is not qualified to do.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of June, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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